

Therefore, at the expiration of three months, a chambering pupil may progress and gain further experience by being allowed to appear and conduct a cause or matter on behalf of his master or of the firm in which his master is practising, before a judge or a registrar of the High Court in chambers; before a judge of the sessions court in chambers; and before a magistrate in chambers and in open court.

Section 36(2) of the Act should be read subject to s 36(5) of the Act which states:

The Master of the pupil, the Bar Council or the State Bar Committee may apply at any time during the pupillage of any pupil to any Judge in chambers for a variation or rescission of the order referred to in subsection (2) and the Judge shall make such order on such application as in all the circumstances seems to be in the best interest of the profession.

Paragraph 7 of the affidavit of Encik Manjeet Singh Dhillon also states:

However, I verily believe that currently proceedings in the subordinate courts are almost entirely conducted in open court and hence, any reference to a chambering student appearing in 'chambers' in a subordinate court may seem to appear superfluous.

The practice of the sessions court hearing chamber matters in the open court is a matter of convenience. Some sessions court judges' office rooms are too small, and most probably their office tables too are not large enough to accommodate three or four learned counsel around it, and there are times when the parties request to be present to hear their learned counsel's arguments in chambers. Under such circumstances, it is quite proper for the sessions court judges to hear chamber matters in open court rooms, provided that they clear members of the public from these rooms. Chambering pupils under s 36(2)(b) of the Act may appear there before any sessions court judge to conduct any cause or matter which is a chamber matter on behalf of their masters.

Order accordingly.

Solicitors: *Shearn Delamore & Co.*

Reported by *Wong Kim Fatt*

A Tan Sew Yok v Ng Keng Huat

HIGH COURT (JOHORE BAHRU) - DIVORCE PETITION NO
47-150 OF 1987
ABU MANSOR J
11 SEPTEMBER 1989

B *Family Law - Custody of child - Interim application pending divorce - Maintenance - Injunction against assault - Parties cross-examined on affidavit evidence - Welfare principles paramount consideration in deciding custody - Law Reform (Marriage and Divorce) Act 1976, ss 77(1)(a) & 93(1)(d)*

C The petitioner was lawfully married to the respondent and lived in Pontian, Johore. On 18 July 1978 the petitioner gave birth to their first and only child who was about ten years old at the time of the hearing of this application made by the petitioner. One month after the birth of the child the petitioner left the matrimonial home together with the child and lived separately from the respondent at the house of the petitioner's parents in Pekan Nenas, Johore. According to the petitioner she moved out because of the respondent's adulterous lifestyle. In 1981 the petitioner reconciled with the respondent and she and the child went back to the matrimonial home in Pontian. Their relationship underwent some strain because, according to the petitioner, the respondent went back to his old lifestyle. They also frequently quarrelled during which the petitioner complained of being assaulted by the respondent. In 1984 the petitioner moved back with the child to her parents' home where the child stayed until he was removed by the respondent on 17 July 1987 during a quarrel. The petitioner then instructed her solicitors to file for divorce. The divorce petition has not been heard and in the meantime she made this interlocutory application for custody of the child, maintenance, and injunction against assault by the respondent.

F Held, allowing the petitioner's application:

(1) After having considered the totality of the evidence and the submissions of counsel, it was decided that the child must be returned to the mother's custody, the reason being that the child had been cared for by the petitioner for the last nine years before he was forcibly taken away from the petitioner. Both mother and child in those formative years had developed strong bonds. The child must have derived comfort from the closeness of his mother. In caring for the welfare and comfort of the child, she had done it almost single-handedly especially at the time when she did not get any help from the respondent. There was therefore no reason to think she would not be able to do it now.

(2) As to attention to be given to the child, the petitioner is now self-employed and would be staying at home doing her tailoring. The court accepted that the father must be at work much of the time as a used-car salesman. No doubt he had cared for the child for almost two years up to the day of the hearing of this application, but it is not difficult to see from the evidence the constraints he has that work against the interest and welfare of the child. As a salesman, he had to leave the child with a friend to be cared for. It is not difficult to see that this arrangement can never be substituted for the motherly care, love and affection as has been shown by the petitioner.

(3) As for the finance of the respondent, the court found in favour of the petitioner who was earning more than the respondent. The respondent's capacity to finance the child is dependent on his mother's grant of \$1,000 per month which would not be given if the child is no longer with the respondent.

(4) The court made an order in terms of the petitioner's application granting custody, care and control of the child to her with reasonable access to the respondent; maintenance of \$200 per month for the child with liberty to either party to apply; an interim injunction restraining the respondent and/or his agent or servant from assaulting or threatening and/or abusing the petitioner; and costs in the cause.

Case referred to

1 *K Shanta Kumari v Vijayan* [1986] 2 MLJ 216 (folld)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 77(1)(a), 93(1)(d)

Teh Poh Teik for the petitioner.

Lee Fei Fung (Ms) for the respondent.

Cur Adv Vult

Abu Mansor J: After reserving judgment, I made an order in terms of the petitioner's application, granting custody, care and control of the child Lawrence Ng Ka Kee to her with reasonable access to the respondent, such order to be complied with in one week from today's date; maintenance of \$200 per month for the child under s 93(1)(d) of the Law Reform (Marriage and Divorce) Act 1976 with effect from 1 October 1989 with liberty to either party to apply; an interim injunction restraining the respondent and/or his agent or servant from assaulting or threatening and/or abusing the petitioner and costs in the cause. I said I would give reasons and I do so now.

By her summons-in-chambers dated 5 March 1988 the petitioner asked for the following orders:

- (a) that the custody and care of Lawrence Ng Ka Kee, an infant, be given to the petitioner;
- (b) maintenance under s 77(1)(a) of the Law Reform (Marriage & Divorce) Act 1976 of \$400 and of \$400 for the child under s 93(1)(d) of the Law Reform (Marriage and Divorce) Act 1976 if custody order is duly made; and
- (c) an injunction restraining the respondent and/or his agents or servants from assaulting and/or threatening and/or abusing the petitioner.

The petitioner's application was supported by her affidavit sworn on 26 February 1988. The respondent filed replies to the petitioner's affidavit. In return, the respondent's affidavits, encl 28 and encl 30, were replied to by the petitioner by giving evidence on oath.

The facts of the case leading the petitioner to make the present application were as follows. The petitioner was lawfully married to the respondent on 18 July 1978 at the Registry Office, Johore Bahru. After the marriage they lived at 132-134, Jalan Johore, Pontian. On 18 October 1978 the petitioner gave birth to their first and only child, Lawrence Ng Ka Kee, at present about ten years old.

A After the birth of Lawrence, one month to be exact, the petitioner moved out from the matrimonial home together with the child and lived separately from the respondent at the petitioner's parents' house at 75, Jalan Sawah, Pekan Nenas, Johore. The reason for the move, according to the petitioner, was because of the respondent's adulterous lifestyle and because of his alleged failure/neglect to provide maintenance to the petitioner and the child. During the period the petitioner stayed with her parents, all her living expenses inclusive of the child's expenses were borne by the petitioner's parents and sisters.

C In 1981 the petitioner reconciled with the respondent and she and the child went back to the matrimonial home to live with him at 134A, Jalan Johore, Pontian. Their relationship underwent some strain because, according to the petitioner, the respondent went back to his old lifestyle. They also frequently quarrelled during which the petitioner complained of being assaulted by the respondent. The petitioner tolerated the respondent but in 1984 she decided to move back with the child to her parents' home where the child stayed until he was removed. The respondent provided maintenance for the petitioner and the child from September 1984 till February 1986, thereafter the respondent did not give them any maintenance.

E The petitioner alleged that on 17 July 1987 the respondent came to her parents' house and assaulted her. The respondent also took the child away by force and after the incident she lodged a police report marked TSY-3. The petitioner alleged that the child is staying alone with the respondent and no one else stays with him besides the respondent. In her affidavit she swore that she had made many attempts to visit the child but was unsuccessful and that the respondent refused to let the petitioner have access to the child. She could only visit the child when the child was at school.

G On 19 October 1987, the petitioner instructed her solicitors to file for divorce. The said divorce petition has not been heard and in the meantime she applied for this interim injunction pending a final order. The petitioner has not been staying with her sister since June 1988. She averred that she is able and willing to provide the child with maternal love and affection. She contended that it would not be in the child's interest to be in the control and care of the respondent. The petitioner averred that the respondent is incapable of looking after the child and had been putting the child in a friend's place whenever he is away from home. The petitioner therefore prays for orders in terms of the application. She is now a self-employed person working as a tailor.

I In reply to the affidavits of the petitioner, the respondent filed three affidavits - encls 19, 28 and 30. In his affidavit as well as his evidence, he did admit that up to July 1987, it was the petitioner who looked after the child.

In the ten years that he had married the petitioner, they were together for only six to seven years. From the time the child was born, he was not always with the mother; at times the child was with the respondent. In all, the respondent says it was the petitioner who sent the child to school and most of the time it was the petitioner who looked after the child. In all the years, he had given maintenance except in 1986 when the respondent alleged that the petitioner refused maintenance.

The respondent said during the nine years he went into the cinema and rubber business, he also entertained his friends in nightclubs and music lounges. When he got back from his outstation trips the petitioner complained of his absence and there would be quarrels. In 1979 or 1980 the petitioner was taken to see a doctor in Singapore. The respondent admitted that he had been photographed being in the company of women and that the petitioner did write to him complaining of his adulterous life. The respondent confirmed much of what had been stated by the petitioner that from 1981 to 1984 they stayed together but in 1984 they stayed apart; when she left she took the son along.

The respondent agreed in cross-examination that for the third term of Standard 3, the child was with him. The child scored 6As in his school work. In the first term of Standard 4, the child had 3As. He agreed this was a deterioration. His results in the second term of 1988 was no A and 1D and in the third term of 1988 the child had no A but 2Ds. The respondent agreed that on the whole from the third term of 1987 to the third term of 1988 there was a general decline in his school record. The child was weak in Bahasa Malaysia and English. From Standard 1 to the second term of Standard 3, the child's performance was more than satisfactory and the child was not in good health. When the child was with the petitioner, he agreed the child went to a good school. The child was given good food and shelter and the petitioner gave the child love and so did he.

In cross-examination the respondent repeated that the petitioner would not be fit to take care of the child as she was suffering from mental illness. They managed as the child was under the care of both of them during the nine years. The respondent said he is a car salesman earning about \$500 per month. If the petitioner earned \$20 per day then the petitioner's income was slightly more. In cross-examination the respondent further revealed that he was not independent financially. He depended on his mother's rental collection of \$1,000 per month. The respondent was only allowed to collect this rental of \$1,000 per month if the child was with him. He maintained that it was not because he wanted to retain the \$1,000 that he was keeping the child.

As regards visiting the child, when the child was in Pekan Nenas and he was staying in Pontian he had no

A problem visiting the child. At times he visited the child more than twice a week. As he was a second-hand car dealer, he always had work and he had no problem visiting the child. As regards the quarrels, it was true that he had gone to the extent of pushing the petitioner but he had never punched her. He did so because the petitioner used a knife to threaten him.

B In his evidence in re-examination, the respondent stated that without his mother's contribution of \$1,000 per month, he could still be independent. At the date of argument (March 1989) the child had been with him for more than two years from July 1987. He had provided food and education. He believed it was better that the child be with him to emulate the father's ways. In terms of health, the son was seldom ill whereas when the child was with the mother, it is on record that from 1983 to 1987 the child visited the family clinic 52 times.

C D I think it is settled law on the many authorities that in matters such as the custody of this child the prime consideration is the welfare of the child. In considering that prime consideration, the care, comfort, attention and the well-being and the happiness of the child are matters that I must take into account: *K Shanta Kumari v Vijayan*¹ followed.

E After having considered the totality of the evidence and the submission of counsels, I decide that the child must be returned to the mother's custody.

F My reason for doing so is that the child had been cared for by the petitioner for the last nine years before he was forcibly taken away from the petitioner. Needless to say both mother and child in those formative years had developed strong bonds. The child must have derived comfort from the closeness of his mother all those years and the mother had given motherly love to him. In caring for the welfare and comfort of the child she had done it almost single-handedly, especially during the time when she did not get any help from the respondent. I have no reason to think she would not be able to do it now. As for the attention to be given to the child, she is now self-employed and would be staying at home doing her tailoring. Even in the conditions when difficulties were put in her way to meet the child, they did not deter her from doing so, waiting for him along the road outside the school so that she might renew her bond with him. The pain of separation from his mother after the child was taken away from the mother affected his studies such that there was a deterioration in his results. I have no hesitation in saying that the place where the child would be happy most would be with the mother.

I Opposed to this is the care and custody of the child being with the father. I accept that the father must be at work much of the time as a used-car salesman. No doubt

he had care of the child for almost two years to the day of the hearing of this application in March 1989 but it is not difficult to see from the evidence the constraints he has that work against the interest and welfare of the child. As a salesman, he had to leave the child with a friend to be cared for. It is not difficult to see that this arrangement can never be substituted for the mother's care, love and affection as has been shown by the petitioner.

As for the finances of the respondent, I would lean in favour of the petitioner who is earning more than the respondent. The respondent's capacity to finance the child is dependent on his mother's grant of \$1,000 per month which would not be given if the child is no longer with the respondent.

After giving the question of custody much consideration, I have no hesitation in making an interim order of granting the application of the petitioner that she be given

A custody including care and control with reasonable access to the respondent with liberty to apply. The child is to be returned in one week from today's date. The application for maintenance of \$200 per month is also allowed with effect from 1 October 1989. The petitioner is granted the interim injunction prayed for with costs to the petitioner to be taxed.

B

Lastly, I wish to mention that I regret that I could not come to an earlier decision as I was indisposed after I heard arguments and while waiting for written submission of counsels.

C *Application granted.*

Solicitors: *Abdul Raman Saad & Associates; Gulam & Wong.*

Reported by *Zarinah Marican*

D
